Judge Davis

2405

SUPREME COURT OF THE UNITED STATES.

No. ~~190.~~ 77

CHARLES MERRIAM, APPELLANT,

VS.

GEORGE HAAS AND MARY HAAS, HIS WIFE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

GOVERNMENT PRINTING OFFICE.

2607

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Citation.

1 UNITED STATES OF AMERICA, *ss:*

To George Haas and Mary Haas, his wife, greeting:

Whereas Charles Merriam has appealed to the Supreme Court of the United States from a part of a decree lately rendered in the district court of the United States for the district of Minnesota in a cause therein pending, wherein he, the said Charles Merriam, was plaintiff, and you, the said George Haas and Mary Haas, were defendants, and has given the security required by law, you are, therefore, hereby cited and admonished to be and appear before the said Supreme Court next, to be holden at the city of Washington, in the District of Columbia, on the first Monday in December next, and then and there to answer to said appeal, and to stand and abide such order and decree in the premises as to said court shall seem meet.

Witness the honorable Rensselaer R. Nelson, judge of the said district court for the district of Minnesota, at the city of St. Paul, in the said district, this 24th day of April, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

R. R. NELSON,
U. S. Judge.

2 Filed Oct. 24, 1862.

Per JAS. W. TAYLOR, *Cl'k.*
J. N. CARDOYS, *D'p'y.*
ALLIS & PECKHAM,
Solicitors, and of Counsel for Pl'ff.

Service of the within citation by receipt of copy admitted this 24th day of April, 1862.

J. & C. D. GILFILLAN,
Def'ts' Solicitors and of Counsel.

3 UNITED STATES OF AMERICA,
District of Minnesota.

CHARLES MERRIAM
vs.
GEORGE HAAS and MARY HAAS, his wife. } In equity.

Pleas before the honorable Rensselaer R. Nelson, judge of the district court of the United States for the district of Minnesota, of the June term thereof, held at Mankato, in and for said district, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-fifth.

District of Minnesota, *ss:*

Be it remembered, that on the seventeenth day of July, in
4 the year of our Lord one thousand eight hundred and sixty,
came Charles Merriam, by Allis & Peckham, his solicitors
and of counsel, and filed in the clerk's office of said court, at Saint
Paul, in said district, his bill of complaint, in the words and figures
following, to wit:

To the honorable the judge of the district court of the United States for the district of Minnesota, sitting in equity:

Charles Merriam, of Boston, in the State of Massachusetts, and a
citizen of the State of Massachusetts, brings this his bill against
George Haas and Mary Haas, his wife, of the city of Saint Paul and
State of Minnesota, and citizens of the State of Minnesota, and thereupon your orator complains and says:

5 That heretofore, to wit, on the 24th day of May, A. D.
1859, at Saint Paul, in the State of Minnesota, the aforesaid
defendant, George Haas, for value received, made his certain promissory note in writing, bearing date at the time and place aforesaid, whereby, two years after the date thereof, he promised to pay to the order of your orator, at Saint Paul aforesaid, the sum of six thousand dollars, with interest thereon, payable semi-annually at the rate of fifteen per cent. per annum till paid and then and there delivered the said note to your orator, as by the said note, ready to be produced by your orator as your honor shall direct, will more fully appear.

And that to secure the payment of the principal and interest mentioned in said note, the said George Haas and Mary Haas, his wife,
did on the 24th day of May, A. D. 1859, aforesaid, duly execute under
their hands and seals, and delivered to your orator, a certain
6 indenture of mortgage bearing date on the day last aforesaid, whereby they granted, bargained, sold and conveyed
unto your orator, and to his heirs and assigns forever, all and singular the following described lands and real estate, with their appurtenances, situated in the county of Ramsey and State of Minnesota, to wit:

Lots one (1) and two (2,) in block twenty-nine (29,) in Kittson's
addition to St. Paul, according to the plat thereof on record in the
office of the register of deeds for the county of Ramsey, aforesaid;
and also the west half of lot eleven (11,) in block twenty-four (24,)
in Saint Paul proper, having twenty-five (25) feet front on Third
street, and a depth of one hundred and fifty (150) feet, according to
the plat thereof on record in the office of the register of deeds for
the county of Ramsey, aforesaid; upon the condition, however, that if
the said George Haas, his heirs, executors or administrators,
7 should pay or cause to be paid to your orator, his executors, administrators or assigns, the principal and interest mentioned
in the aforesaid promissory note, according to the tenor and effect and
conditions thereof, then the said indenture of mortgage should be

void, otherwise it should be and remain in full force and effect; which indenture of mortgage was duly acknowledged by the said mortgagors, and was afterwards, to wit, on the 25th day of May, A. D. 1859, at ten o'clock and twenty minutes in the forenoon of that day, duly recorded as a mortgage in the office of the register of deeds for the county of Ramsey aforesaid, as by the said mortgage and the certificates of acknowledgment and of the recording aforesaid endorsed thereon, and ready to be produced as your honor shall direct, will more fully appear.

And your orator further says, that the mortgagors aforesaid have wholly failed to comply with the conditions of said mortgage, and have absolutely refused and do now absolutely refuse to pay the
principal and interest mentioned in said note, although often
8 requested thereto by your orator, and that no part of the
principal and interest mentioned in said note has ever been
paid or collected.

And there now remains due and unpaid to your orator upon the said note and mortgage the sum of nine hundred dollars, with interest on four hundred and fifty dollars thereof, from and after the 24th day of November, A. D. 1859, and on the balance thereof from and after the 24th day of May, A. D. 1860; and that there will become due and owing to your orator on the 24th day of November, A. D. 1860, upon the said note and mortgage, the further sum of four hundred and fifty dollars, and on the 27th day of May, A. D. 1861, the further sum of six thousand four hundred and fifty dollars, with interest thereafter on six thousand dollars thereof at the rate of fifteen per cent. per annum till paid; and that no proceedings have been had at law for the recovery of the aforesaid debt secured by the said note and
mortgage, or of any part thereof.

9 To the end, therefore, that the said defendants may, if they
can, show why your orator should not have the relief hereby
prayed, and may without oath, their answers on oath being hereby waived, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the premises aforesaid;

And that the usual decree may be made for the sale of the said mortgaged premises, and for the payment of the amount due and to become due to your orator, for principal and interest upon the said note and mortgage, and the costs and disbursements of this suit;

And that the said defendants, and all persons claiming under them subsequent to the commencement of this suit, and all persons who have any liens by judgment, or decree, or otherwise, upon the said mortgaged premises subsequent to the said mortgage of your orator,
or any liens or claims thereon by or under any such subse-
10 quent judgment or decree, either as purchaser, incumbrancer,
or otherwise, may be barred and foreclosed of all equity of
redemption in and to the said mortgaged premises, and every part and parcel thereof;

And that the said George Haas may be decreed and directed to pay to your orator any balance of the principal or interest of the said mortgaged debts that may remain unsatisfied after the sale of the said mortgaged premises, as aforesaid;

And that your orator may have such other and further relief in the premises as the nature of the case may require, and as may be agreeable to equity—

May it please your honor to grant unto your orator the writ of subpœna of the United States of America, issued out of and under the seal of this court, commanding the said defendants, George Haas and Mary Haas, his wife, at a certain day, and under a certain penalty therein to be specified, personally to be and appear before your honor in this court, and then and there to answer to all and
11 singular the premises, and to stand and abide such order and decree therein as to your honor shall seem meet.

And your orator shall ever pray, &c.

ALLIS & PECKHAM,
Solicitors and of Counsel for Plaintiff.

And thereupon, on the application of said solicitors, a writ of subpœna was duly issued in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Minnesota, ss:

[SEAL.] The President of the United States of America to George Haas and Mary Haas, his wife, greeting:

You are hereby commanded that you personally appear before the judge of the district court of the United States of America, for the district of Minnesota, in our court of chancery, in and for the district aforesaid, on the first Monday of September next ensuing,
12 at Saint Paul, to answer to a bill of complaint exhibited against you in our said court by Charles Merriam, and to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said George Haas and Mary Haas, his wife, if to be found in his district, and due return thereof make.

Witness the honorable Rensselaer R. Nelson, judge of the district court of the United States of America for the district of Minnesota, at the city of St. Paul, in the said district, this seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

ALLIS & PECKHAM, *Solicitors.*
GEORGE W. PRESCOTT, *Clerk.*

13 It is ordered by our said court that the said George Haas and Mary Haas, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and

time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

Which said process of subpœna was duly tested, signed, and sealed with the seal of our said court.

And which said process of subpœna was subsequently returned to our said clerk's office by the marshal of said district, endorsed as follows:

"Served the within subpœna upon George Haas and Mary Haas, his wife, by delivering a certified copy of the same to George Haas at his residence in St. Paul, in said district, July 27, 1860."

WM. B. GERE,
U. S. Marshal.

Fees, $4 75.

14 And afterwards, to wit, at rules held in the clerk's office of said court, at Saint Paul, on the first Monday of September, in the year of our Lord one thousand eight hundred and sixty, the following proceeding among others was had:

CHARLES MERRIAM
vs.
GEORGE HAAS and MARY HAAS.

And now come the defendants, by J. & C. D. Gilfillan, their solicitors, and, on their motion, it is ordered that the appearance of said defendants in this cause be and the same is hereby entered.

And afterwards, to wit, on the third day of September, in the year of our Lord one thousand eight hundred and sixty, came George Haas and Mary Haas, his wife, defendants above named, by J. & C. D. Gilfillan, their solicitors, and filed in said clerk's office at Saint Paul, in said district, their answer to the said bill of complaint, in the
15 words and figures following, to wit:

United States district court for the district of Minnesota.—In equity.

The joint answer of George Haas and Mary Haas, his wife, defendants, to the bill of complaint of Charles Merriam, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or to so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say:

They admit the defendant, George Haas, did make and deliver to the said complainant such promissory note in writing, of such date and to such purpose and effect as is in the complainant's said bill mentioned and set forth, and did thereby promise to pay to the order of said complainant the sum at the time and with the
16 interest mentioned in said bill.

These defendants, further answering, say, that they admit that they did execute and deliver to said complainant such indenture of mortgage under their hands and seals, and of such date and to such purpose and effect, upon such real estate, and with such condition, as is in the complainant's said bill of complaint mentioned and set forth; and they admit that such mortgage was duly acknowledged and recorded as in said bill mentioned; and further answering, they admit that no part of the principal or interest mentioned in said note has ever been paid or collected, and that no proceedings have been had at law for the recovery of the debt secured by the said mortgage, or any part thereof.

And these defendants deny that there now remains due upon the said note and mortgage the sum of nine hundred dollars, or interest
on four hundred and fifty dollars thereof from and after the
17 24th day of November, 1859, or on the balance thereof from
and after the 24th day of May, 1860.

And they deny that there will become due and owing to the said complainant, on the 24th day of November, 1860, upon the said note and mortgage, the further sum of four hundred and fifty dollars, or on the 27th day of May, 1861, the further sum of six thousand four hundred and fifty dollars, with interest thereafter on six thousand dollars thereon at the rate of fifteen per cent. per annum until paid.

And further answering, these defendants say, that there is due and owing to the said complainant, upon the said note and mortgage, no other or greater sum or sums than six thousand dollars, with interest on three hundred dollars thereof from and after the 27th day of November, 1859, and on three hundred dollars thereof from and after the 27th day of May, 1860; and that there will be due and
become owing to the complainant, upon the said note and
18 mortgage, no other or greater sum or sums than as follows, to
wit:

On the 27th day of November, 1860, the sum of three hundred dollars, and on the 27th day of May, 1861, the further sum of four thousand three hundred dollars, with interest thereafter on four thousand dollars thereof at the rate of seven per cent. per annum until paid.

And these defendants, further answering, say, that at Saint Paul, in the State of Minnesota, on the 24th day of May, 1859, the said complainant and the defendant, George Haas, entered into a contract or agreement whereby the said complainants, in consideration of the execution of said note and mortgage, and of the promises therein contained, did promise and agree to and with the defendant, George Haas, to loan and advance to him, the said George Haas, the sum of six thousand dollars, as follows, to wit: four thousand dollars thereof to be advanced and delivered to the said George Haas on said 24th day of May, 1859, and the balance thereof, to wit, the sum
of two thousand dollars, to be advanced and delivered to said
19 George Haas as soon as he, the said George Haas, should
thereafter have completed a building then in process of erection on the west half of lot 11, in block 24, St. Paul proper, and

should have effected good insurance thereupon in the sum of four thousand dollars, and transferred such insurance to said complainant.

That in consideration of such promise and agreement of the complainant to loan and advance said moneys, the said George Haas did execute and deliver the promissory note, and these defendants did execute and deliver the indenture of mortgage mentioned and set forth in the complainant's said bill of complaint.

And these defendants, further answering, say, that the aforesaid promise of the complainant to loan and advance the said sum of six thousand dollars to said George Haas, in the manner and at the times hereinbefore stated, was the sole and only consideration for the execution of the promissory note and mortgage mentioned
20 and set forth in complainant's said bill of complaint.

The defendants, further answering, say, that on the 24th day of May, 1859, the said complainant did, pursuant to his said promise and agreement, advance and deliver to said George Haas the sum of four thousand dollars, and no more; that before the 30th day of July, 1859, the said George Haas had fully completed the building aforesaid, and had effected good insurance thereupon for four thousand dollars, such insurance, by the policy whereby the same was effected, being made payable, in case of loss, to the said complainant; and on said 30th day of July, 1859, at Saint Paul aforesaid, did deliver the policy of insurance to Caldwell & Co., of St. Paul, the agents of said complainant, and who were duly authorized by him to receive and approve the same, as the said George Haas had been directed by said complainant to do, and that said policy of insurance was then and there received and approved by, and was satisfactory to, the complainant's agents; and
21 the defendant, George Haas, did then and there demand of the said complainant the said sum of two thousand dollars, pursuant to said agreement; and that the said complainant did then and there wholly neglect and refuse, and hath since wholly neglected and refused, to advance and deliver unto the said George Haas the said sum of two thousand dollars, or any part thereof; and the said complainant hath never advanced and delivered to these defendants, or either of them, or to any person of them, or either of them, any other or greater sum of the said six thousand dollars than the said sum of four thousand dollars; all which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct.

And these defendants humbly pray that the said sum of two thousand dollars be deducted from said note and mortgage, as of the dates thereof; and that by the decree which shall be made
22 herein, there be allowed to said complainant only the sum of four thousand dollars, with interest from the date of said note

or mortgage, according to the terms thereof, and for such other and further relief in the premises as the court shall seem meet and just.

GEORGE HAAS.
MARY HAAS.
J. &. C. D. GILFILLAN,
Solicitor for Defendants.
H. R. BIGELOW,
of Counsel.

STATE OF MINNESOTA, *ss:*

I, James Gilfillan, a counsellor of the United States district court for the district of Minnesota, do hereby certify that the foregoing answer was subscribed by the above named defendants, George and Mary Haas, and that the signatures of said George and Mary, appended to said answer, are their genuine signatures.

JAMES GILFILLAN.

ST. PAUL, *Sept.* 3, 1860.

21 And afterwards, to wit, on the first day of October, in the year one thousand eight hundred and sixty, came the said plaintiff, by Allis & Peckham, his solicitors, and filed in the clerk's office of said court, at said Saint Paul, his replication to the answer of said defendants, in the words following, to wit:

District court of the United States for the district of Minnesota.

CHARLES MERRIAM
against
GEORGE HAAS and MARY HAAS, his wife.

The replication of Charles Merriam, plaintiff, to the answer of the defendants above named.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the
22 answer of the said defendants, for replication thereunto, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

ALLIS & PECKHAM,
Pl'ff's Solicitors.

2617

23 And afterwards, to wit, at rules held in the clerk's office of said court on the seventh day of January, in the year one thousand eight hundred and sixty-one, the following proceedings, among others, were had, to wit:

CHARLES MERRIAM
vs.
GEORGE HAAS and MARY HAAS, his wife.

And now, upon filing the stipulation of Allis & Peckham, solicitors for plaintiffs, and J. & C. D. Gilfillan, solicitors for defendants, and on motion of said defendants' solicitors, it is ordered that the usual commission issue to such person or persons as the judge of the court shall direct, to take the testimony of such witnesses as shall be produced by the parties herein, upon oral interrogatories by said solicitors. And thereupon, on like motion, it is further ordered that George W. Prescott be, and he is hereby, appointed commissioner to take the testimony aforesaid.

And afterwards, to wit, on the sixteenth day of February, A. D. 1861, at the said clerk's office aforesaid, upon filing stipulation of the parties herein by their said solicitors, it is ordered that publication of the testimony taken in this cause do pass in the said clerk's office forthwith.

And afterwards, to wit, at rules held in the clerk's office, at St. Paul, on the twenty-fifth day of May, A. D. 1861, the following proceedings, among others, was had, to wit:

24 CHARLES MERRIAM
vs.
GEORGE HAAS and MARY HAAS, his wife.

And now comes the plaintiff, by Allis & Peckham, his solicitors, on whose motion it is ordered that this cause be, and the same is hereby, set down for hearing at the next ensuing term, being the June term of this court, and that the usual subpœna to hear judgment issue.

And afterwards, to wit, at a stated term of the district court of the United States for the district of Minnesota, of the June term thereof, held at Mankato, in and for said district, in the year one thousand eight hundred and sixty-one, on the first day of said term, the following proceedings, among others, were had:

CHARLES MERRIAM
vs. Foreclosure.
GEORGE HAAS and MARY HAAS, his wife.

25 This day this cause came on to be heard upon the pleadings and proofs herein, and Lorenzo Allis, esq., solicitor and of counsel for said plaintiff, moves the court to suppress such portions of the depositions on file as were received subject to objection for incompetency. Whereupon, on consideration by the court, it is ordered that the testimony of George Haas, taken before the commis-

sioner herein, be suppressed, the said Haas being the defendant in this cause; and argument was made by Lorenzo Allis, esq., for the plaintiff, and by C. D. Gilfillan, esq., for the defendants, and said cause was submitted to the court, and by the court held under advisement.

And afterwards, to wit, on the same day of said term, the following proceeding, among others, was had:

CHARLES MERRIAM
vs.
GEORGE HAAS AND WIFE. } Foreclosure of mortgage. In chancery.

This day this cause came on to be heard upon the issues joined
and testimony taken herein, and was argued and submitted
26 to the court; and afterwards it is, upon consideration thereof,
ordered, adjudged, and decreed, that the said defence of the defendant, in his answer set forth, is sustained, and that the plaintiff is entitled to his decree and judgment in accordance with the admissions in said answer.

It is therefore ordered that this cause be, and it is, referred to the clerk of this court, who is a master herein, to compute and report the amount due the plaintiff for principal and interest, as in said answer set forth and admitted.

The said master makes report, in writing, that he has computed the amount due the plaintiff for principal and interest at this date upon the note and mortgage in said complaint described, under the ruling of the court in this cause, to the sum of five thousand two hundred and seventy-one dollars and six cents.

It is therefore, upon inspection thereof, and on motion of plaintiff's solicitor, ordered that said report be, and it is hereby, confirmed.

27 It is therefore, on motion of L. Allis, of counsel for said plaintiff, further ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest, and costs in this cause, and which may be sold separately without material injury to the parties interested, be sold at public auction under the direction of a master in chancery of this court, unless said mortgagor, previous to such sale, shall pay to said plaintiff the said sum of five thousand two hundred and seventy-one dollars and six cents, and interest thereon from this date, together with his costs in this cause to be taxed.

And it is further ordered that said sale be made according
28 to the rules and practice of this court; that said master give
public notice of the same by advertisement published in some newspaper printed in the city of Saint Paul, in said district, at least once in each week for six successive weeks previous to the day of sale; that the plaintiff, or any of the parties to this cause, may become the purchaser at such sale; that said master execute a deed or deeds to

the said purchaser or purchasers of the mortgaged premises after the expiration of one year from said day of sale, unless the same shall have been previously redeemed, pursuant to law and the rules of this court; that said master, out of the proceeds of such sale, after satisfying any prior liens upon said premises, pay to the plaintiff, or his solicitors, his costs in this cause to be taxed, and also the aforesaid sum of five thousand two hundred and seventy-one dollars and six cents,
and interest thereon from this date to the day of such sale, or so
29 much thereof as the purchase-money of said mortgaged premises
will pay, and file receipts therefor with his report of sale; and that he bring the surplus money, if any there be, into court without delay, to abide the further order of the court.

And it is further ordered, adjudged, and decreed, that the purchaser or purchasers of said mortgaged premises at such sale be let into the possession thereof, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this cause, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the deed of said master for such premises, and a certified copy of the order confirming the report of sale in this cause.

And it is further ordered, adjudged, and decreed, that the
30 defendants, and all persons claiming or to claim from or under
them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, unless the same shall be redeemed within one year as aforesaid.

And it is further ordered, that in case said mortgagor, or any person lawfully claiming through or under him, shall not, within eight days after said sale, pay or cause to be paid to said purchaser or purchasers at said sale the interest upon the amount of said sale or purchase for one year, at the rate of twelve per cent. per annum, then the said purchaser or purchasers shall be let into the immediate possession of the said premises and of the use, rents, and profits thereof.

And it is further ordered and decreed, that if the moneys arising from said sale are insufficient to pay the amount due the plaintiff as aforesaid, for principal, interest, and costs, that said master specify
the amount of such deficiency in his report of the sale; and
31 that on the coming in and confirmation of said report, the de-
defendant, George Haas, who is personally liable for the payment of the debt secured by said mortgage, pay to the plaintiff the amount of such deficiency, with interest thereon from said day of sale, and that plaintiff may have execution therefor.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows: "Lands and real estate with their appurtenances, situate in the county of Ramsey and State of Minnesota, to wit: lots one (1) and two, (2,) in block twenty-nine, (29,) in Kittson's addition to St Paul, according to the plat thereof, on record in the office of register of deeds for the county of Ramsey aforesaid; and also the west half of lot eleven, (11,) in block twenty-four, (24,) in Saint Paul proper, hav- 32 ing twenty-five (25) feet front on Third street, and a depth of one hundred and fifty feet, according to the plat thereof, on record in the office of the register of deeds of Ramsey county aforesaid.

R. R. NELSON,
U. S. Dist. Judge.

33 And there are on file in this cause, and indorsed as filed on the 16th February, A. D. 1861, the commission and return thereto, and depositions and exhibits, in words following, to wit:

The President of the United States to George W. Prescott, esquire, greeting:

You are hereby authorized and appointed to take the testimony of such witnesses as may be produced before you in a case pending in the district court of the United States for the district of Minnesota, before the judge thereof, wherein Charles Merriam is plaintiff, and George Haas and Mary Haas, his wife are defendants, pursuant to the stipulation of the solicitors of said parties.

Said examination may be conducted upon oral interrogatories.

You will cause the depositions of the witnesses to be signed by them; at the foot thereof you will add a certificate subscribed by yourself, stating that the same were sworn to, and subscribed 34 by said witness, and the time and place where said depositions were taken.

Which said examination of said witnesses so taken, with your certificate thereto attached, you will send directed to our clerk of our said district court of the United States for the district of Minnesota, at St. Paul, in said district, sealed with the names of the parties litigant, indorsed thereon, on or before the first Monday of June next, together with this writ.

Witness the honorable R. R. Nelson, judge of our said court at St. Paul, in said dist., this seventh day of January, in the year [SEAL.] one thousand eight hundred and sixty-one, and of our independence the eighty-fifth.

GEORGE W. PRESCOTT, *Clerk.*

District court of the United States, district of Minnesota.

CHARLES MERRIAM
vs.
GEORGE HAAS AND WIFE. } In chancery.

35 And now, on this sixth day of February, A. D. 1861, pursuant to notice and order setting this cause down for taking testimony on this day, come the parties before me, George W. Prescott, commissioner to take testimony in this cause, at his office, in Saint Paul, in said district; and thereupon witnesses are duly cautioned, sworn, and examined, as follows, to wit:

George Haas, on the part of the defendant, being first by said master duly sworn, deposes and says:

"I am one of the defendants in this suit."

The counsel for the plaintiff here objects to any testimony on the part of this witness, on the ground that he is a party in interest in this cause, and a defendant herein, and the testimony is taken subject to such objection.

"I know Charles Merriam, the plaintiff. I made an arrangement with Merriam, about the 24th of May, 1859, in relation to borrowing some money of him. It was made in Caldwell's Bank, in Saint
36 Paul. The arrangements were made with Merriam to lend me six thousand dollars upon the lot on Third street and two lots on Seventh street. When this arrangement was made, Mr. Merriam would not let me have the six thousand dollars right away on this property. Merriam offered to let me have the money, but could not let me have $6,000 at once, because the house was not finished, but would let me have four thousand down, and two thousand when the house was completed and insured. I was to give a mortgage for the four thousand dollars; when the house was finished and insured I was to have the other two thousand, and give another mortgage for that."

This testimony objected to on the ground that it contradicts the allegations in the answer, and taken subject to such objection.

"I told Merriam this arrangement didn't suit me, for he might die, and then I could not get the other two thousand dollars.
37 I told Merriam I would give him a mortgage for 6,000 dollars; to take $4,000 immediately, and the other $2,000 after completion of the building and handing over the insurance policy. I told him for the other two thousand dollars, which I did not receive, he should give me a writing. This proposition suited him, and he told me he would make the papers; and as soon as I got the building completed, I should deposit the insurance papers with Caldwell & Co., and Caldwell should then write to him (Merriam) to forward the money. Merriam told me I would have to pay interest to him on the whole six thousand dollars from the time the mortgage was made, and when the two thousand dollars was paid over a reduction should be made for the interest. The mortgage described in the complaint in this cause is the mortgage I was to execute under the foregoing contract. The mortgage and the note were executed on the same day when this agreement was made. Mr. Merriam
38 gave me the paper mentioned that he was to execute. This is the paper—Exhibit 'A,' hereto annexed. Mr. Merriam signed this, and delivered it to me the same day. I cannot say positively, but think the building referred to in the exhibit was completed about the middle of August, 1859. I effected an insurance on this building on the 30th of July, 1859, for somewhat over five thousand dollars; the insurance policy was made payable to Charles Merriam, in case of loss. I delivered the policy to Caldwells in the bank, and requested them to write to Mr. Merriam for two thousand dollars. I took a receipt for the policy from the Caldwells."

Question. State what the Caldwells said in regard to the policy when it was delivered to them, and in regard to writing for the $2,000.

The question objected to, and answered subject to objection.

The Messrs. Caldwells told me they would write that same day. I asked them how long it would take to have an answer, or to have the money at St. Paul. They told me it would take about two 39 weeks; they told me, immediately after that, that I should come in any time I wanted money and they would advance it. I never got any part of this $2,000 from Mr. Merriam or the Caldwells, or any one else. On the 13th July I asked the Caldwells if they could loan me $\$76\frac{50}{100}$ until I got the $2,000 of Merriam, to pay freight on the columns. They loaned me the money. I got, in all, of the Caldwells about $825 (dollars,) including the $\$76\frac{50}{100}$. I requested the Caldwells that they should continue to loan me until I got the $2,000 from Merriam. The Caldwells made an assignment on the ninth of August; after their failure I telegraphed to Mr. Merriam. I received a letter from Merriam afterwards in answer to that. This is the letter:

(Exhibit "B," hereto annexed.) This is Merriam's signature to the letter; it is in his handwriting. After receiving this letter, I went to the Caldwells and requested them about the money, on Seventh street. Don't know positive about the answer they gave, but to the 40 best of my recollection they said they couldn't pay it. I requested them for the money only once; to my recollection, I never got the money. At the time this mortgage was given, and afterwards, Mr. Merriam lived in Boston, Massachusetts. I first saw Mr. Merriam after this transaction, last spring, when he was up here. I did not ask Mr. Merriam for the money. When I made the arrangement with Merriam for the money, Knauft was present, and the Caldwells were present in the bank, I think, but am not positive that Louis Knigu was present at the conversations held about borrowing the money.

Cross-examined by L. Allis, says:

The note described in the complaint in this cause is the same one which was executed in accordance with the agreement spoken of. I took the insurance policies that I have spoken of to the Caldwells on the 30th July; I took receipts for them; I did not get the receipts immediately, but got them afterwards. This is the 41 receipt I spoke of (annexed and marked Exhibit "C") as taken from the Caldwells for the policies. At the date of this receipt I had other policies, and I went to the Caldwells and got receipts for all of them. The policies mentioned in this receipt are renewals of the policies left with Caldwells on the 30th July, 1859. I had the renewals made in Mr. Merriam's name. This is all the receipt I got from the Caldwells; never took any other. Could not say positive, but think the building was completed somewhere near the middle of August, 1859; I think it was as late as that; the building was not completed at the time of Caldwell's failure. I think it was the 11th of August that I telegraphed to Merriam. I cannot specify

the exact words of my telegraph, but think it was that the Caldwells were broke, and that Merriam should not send or pay the money to them. Cannot say positively whether the telegraph was that he should not pay the draft, or whether it was that he should not send the
money. I heard a day or two after the failure that the Cald-
42 wells had drawn a draft for the money, and that was against
my instructions. The instructions were given to the Caldwells on the 30th July. They were to write to Merriam then immediately. I didn't know the Caldwells were going to draw the money by draft. I expected the money would be forwarded by Merriam to Caldwells, and then I would get it from them. I had a bank account with the Caldwells on the 30th day of July; had kept one from the time I got the $4,000, in May. On the 6th of August I took a book of them—a bank book—I have that book here; this is it: (produced and put in evidence, marked Exhibit "D," and returned with this testimony into court.) The $4,000 mentioned in this book is the $4,000 I had of Mr. Merriam; it is under date of May 25th. This 1st item on the last page of writing is the same item mentioned in my direct examination as paid for freight on the columns. These items on same page are the sums represented in my first examination as borrowed of the
Caldwells; they were paid on checks drawn by me on Cald-
43 well & Co. I have never paid this money I represented as
borrowed from the Caldwells. I never demanded of the Caldwells the amount this book shows to be due me as balance. Cannot say positive whether I have ever demanded it of the assignee, Mr. Turrell, or not.

Question by pl. counsel. Are you not a preferred creditor of Caldwell & Co. for this amount of balance?

Objected to by def't's counsel, and answered subject to objection. The objection is, that it is not the best evidence of the fact, and the fact is not material.

I heard that I was, and afterwards I saw it on the list in the assignment in the recorder's office. I gave the Caldwells no other evidence of indebtedness for this money (on last page of writing in this book) than the checks I drew. The building spoken of in the contract was not complete at the time I telegraphed to Merriam. I asked Caldwell & Co. for this $2,000 some time after the failure. I cannot tell the date. It was soon after receiving this letter in an-
swer to the telegraph. I showed the Caldwells the letter.
44 Never asked Caldwell & Co. for the money after that time.
I never asked Merriam for the money myself since showing this letter to Caldwell & Co. I cannot say whether or not the building was completed at the time of receiving this letter from Merriam. Cannot say whether or not it was done when I showed the letter to Caldwell & Co. and asked for the money. I have not paid any interest or any of the principal on the note mentioned in the complaint.

Re-direct examination.

Witness says: On the 30th of July, 1859, I deposited two policies of insurance on the building mentioned in the contract with Caldwell & Co. They were payable to Mr. Merriam. They were for one year. They were renewed a year afterwards, when they expired. The two policies mentioned in this receipt, Exhibit "C," for $2,625 each, are the two policies spoken of. The policy of $1,800, mentioned in this receipt, is on two houses on 7th street, on lots one and two, in block 29, in Kittson's addition to St. Paul, described
45 in the mortgage. This policy was got before I made the loan of Merriman, and was assigned to him at the time the loan was got. Merriam received this policy at the time I got the loan. I got this policy renewed in January, 1860, at the time this receipt was given. I never gave the Caldwells any instructions except what I gave them on the 30th July, 1859. I gave them no other instructions on that day than that they should write to Merriam for the money. The $4,000 was not paid directly by Merriam, but was paid through Caldwell & Co. (This objected to as immaterial.) I never authorized Caldwell & Co. to make this entry on 3d page of writing in this book, Exhibit "D," of $2,000. I cannot read English, except a word or two. I did not know at the time this entry of $2,000 was made. When they threw the book back to me, and I saw this writing on last page, I saw on this 3d page of writing "30th August." I saw the month and the date, and the $2,000. I didn't know what it meant at that time. I thought it was of no consequence. After they failed, I found out what it meant by Zim-
46 merman. I then went to Caldwells, in the back office, and asked Turrell what it meant by putting the date the "30th of August." The Caldwells have never asked me to pay the money I borrowed of them. The assignee has never asked me to pay it. The building was under roof and they were plastering when the Caldwells failed. Cannot tell how near the building was completed when I asked Caldwell & Co. for the $2,000, after I got the letter from Merriam. All Caldwell said when I asked him for the money at that time was that he could not pay it.

Cross-examination.

I got this book immediately after I made the mortgage and note described, Exhibit "D." I have kept it ever since. I understand the figures that are used in English. I understand that the entries on the left hand side of this book, "Exhibit D," are entries of moneys to my credit, and that the entries on the right hand side repre-
47 sent the checks drawn by me against the money I have in bank. This entry in this book of $4,000 on the 25th of May was made on that day, and was for the money that Merriam agreed to loan me. This entry of $2,000, dated August 30, was put in the book on the 6th day of August. It was after the assignment that Mr. Zimmerman told me what this $2,000 entry meant. When I saw Mr. Turrell

he told me the difference in the dates was a mistake. Turrell may have told me that it was intended for 3 th July. I think Turrell did tell me that it was intended for 30th July.

GEORGE HAAS.

Subscribed and sworn to before me this 6th day of February, A. D. 1861.

GEO. W. PRESCOTT,
Commissioner.

Hearing continued to-morrow morning at eleven o'clock.

GEO. W. PRESCOTT, *Master.*

48 THURSDAY, *February 7th*, 1861.

Hearing resumed, and witnesses examined as follows:

Anton Saner, for the defendant, being first duly sworn, says: I know Mr. Haas, the defendant. I know Caldwell & Company, in this city. I went with Haas in July, 1859, to Caldwell & Co., at the time he left some policies of insurance there. When Haas handed the policies to Caldwell, he told Caldwell to write on for the money. Caldwell said he would do so the same day. Haas asked how long it would take for the money to come, and Caldwell said in about two weeks.

(Plaintiff's counsel objects to all testimony as to what Caldwell said, as being declarations of third parties.)

Cross-examination.

I am not interested in this matter; am not a relation of Mr. Haas. I put up his building. Mr. Haas wanted me to go along with him.
He wanted some money for me. It was the 30th of July. I
49 recollect the day, because I gave a receipt and got some money.
I got 250 dollars that day. Mr. Haas had to sign a check, and the money was paid over. Caldwell & Co. paid it to Mr. Haas, and Haas paid it over to me in the bank there at the same time. I got no more money there between that time and the Caldwells' failure. Mr. Haas owes me some for work on that building yet, and I have his note for it.

Re-direct examination.

We were in Caldwell & Co.'s in the morning of that day before Mr. Haas took the policies in.

Question. What was said between Mr. Haas and the Caldwells at that time in regard to the policies of insurance and the procuring the $2,000?

(Objected to, as being declarations of the party and of a third party.)

Answer. Mr. Caldwell said to Mr. Haas, that so much sooner he
got the policy, so much sooner he would get the money. We
50 then went out and got the policies and delivered them to
Caldwell & Co., and got the 250 dollars. I think the building was completed about the latter part of August.

Cross-examination.

I am not sure that the building was completed before the first of September, but think it was. I believe it was the latter part of August—after the 25th.

ANTON SAUER.

Subscribed and sworn to before me this 7th day of February, A. D. 1861.

GEO. W. PRESCOTT,
Commissioner.

Louis Kreiger, for defendant, being first duly sworn, deposes and says:

I know the plaintiff and defendant, George Haas. I was acting as interpreter between them in regard to the loan spoken of in this examination.

Question. State what was said between the parties in regard to the loan.

(Objected to stating any more than what was the agreement of the parties.)

51 Answer. Mr. Merriam agreed to loan Mr. Haas $6,000. Haas was to have $4,000 down, and $2,000 after he had the building insured and the insurance policy deposited with the Caldwells. The security was to be two lots and houses on Seventh street, and the lot he was building upon on Third street. I think the mortgage was to be drawn for $6,000. I interpreted I think for Mr. Merriam to Mr. Haas, when they finally agreed upon both sides to the negotiation that Merriam would give Haas $4,000 immediately, and $2,000 when the building was erected, so as to have it insured; and as soon as Haas should deposit the policy with Caldwell & Co., they then should write him to send on the 2,000 dollars, and that he would give Haas a writing to that effect. The policies when effected were to be deposited with Caldwells, and they were then to write to Merriam for the $2,000. I was not present when the writings were drawn. I know Merriam's handwriting; have seen him
52 write in these transactions. Exhibit "A" shown to the
witness. This signature looks like his signature, but I couldn't swear to it.

Question. State whether you think this is or is not the signature of Mr. Merriam.

(Objected to.)

Answer. I think it is his handwriting. Exhibit "B" shown witness. I think the signature is Merriam's handwriting.

(Objected to as above.)

Cross-examination.

Have you only seen Merriam write in these transactions?

Saw him write most in office of Mr. Allis. Think on one or two occasions I saw him write more than his signature; couldn't say that

I have seen him write it half a dozen times; don't remember. I think I have seen him write his name, but am not positive. Exhibit "A" shown witness. I do not know whether this is Merriam's signature. Exhibit "B" shown witness. Would not swear positively that this is Merriam's signature. The parties finally
53 agreed upon giving a mortgage for $6,000, and having the
$4,000 down and the $2,000 when the building was insured. I think I have seen Merriam write his signature. I have seen Merriam sign his name. Can't say how many times. May or may not have seen him sign his name half a dozen times. Cannot swear to four times. Cannot set any number of times; would not swear to twice unless I had the exact documents which I saw him write.

Re-direct examination.

I have had delivered to me by Mr. Merriam papers signed by him. On some occasions have seen him writing the papers before handing them to me. When I state that I cannot swear positively that I have seen him write his name, I mean that I cannot swear positively that I was looking at the pen and paper when he was writing the identical words which constitute his name.

Cross-examination.

That is all I mean when I state that I cannot swear positively;
cannot say that I was looking at Mr. Merriam when
54 he was writing his signature. I can only swear to one paper
that Mr. Merriam delivered to me that had his signature;
there might have been others.

LOUIS KRIEGER.

Subscribed and sworn to before me this seventh day of February, 1861.

GEO. W. PRESCOTT,
Commissioner.

Hearing continued to Wednesday next, February 13th, 1861, at 11 o'clock a. m.

GEO. W. PRESCOTT,
Commissioner.

WEDNESDAY, *February* 13, 1861.

By consent of parties, hearing continued to Friday next, at 11 o'clock.

FRIDAY, *February* 15, 1861.

Hearing resumed; parties present by their counsel.

Edwin Caldwell, being first duly cautioned and sworn, on part of the plaintiff, deposes and says: I know the plaintiff, Charles Merriam,
and the defendant, George Haas. Mr. Haas applied to me,
55 I think, in the spring of 1859, to negotiate a loan for him with
some one. It was before Mr. Merriam came here. I was

then in the business of banking, brokerage, paying taxes, &c. I was in a firm for that business by the name of "Caldwell & Company." I received Mr. Haas's application and made a minute of it in a pass-book kept for that purpose. That was our usual custom when parties applied, and we seriously entertained their application. We received quite a number of applications about that time—some six or eight. At that time it was the custom of parties applying for the loan to pay the commission; the custom with us. We had an understanding with Mr. Haas in regard to the commission for that loan. It was, that Mr. Haas was to pay us two per cent. I think that was it, but it might have been somewhat less. The amount was agreed upon with Haas previous to his receiving the money upon the loan.

56 He agreed to pay the commission agreed upon. The plaintiff Merriam afterwards came here, I think it was in May, 1859; it was in the spring, I think.

I undertook to negotiate a loan with him for Mr. Haas. I procured one. Mr. Merriam agreed to let Mr. Haas have I think six thousand dollars, of which the larger portion he was to let him have when the papers were made out; I think it was about 4,000 dollars; the balance, I think, on the completion of a certain building on Third street. The agreement was so modified, I think, that the balance was to be paid when the building was insured, and the policy signed. The mortgage and note was finally executed and signed by Mr. Haas. The property described in the mortgage was, I think, on the corner of Seventh and Broadway streets and property on Third street. It was the property on Third street that the building was on which was going to be insured and completed, before the balance of the loan was paid over. The lot on Seventh street was, I think, on the southeast corner of Broadway and Seventh streets.

57 It is admitted by defendants' counsel that the mortgage and note spoken of by witness is the same described in the complaint.

The portion that Mr. Merriam was to pay down was paid either personally to Mr. Haas, by Mr. Merriam, or deposited in our bank to Mr. Haas's credit, and with Mr. Haas's sanction.

Mr. Haas had a bank account with us at that time. He drew checks against this afterwards, and drew out this $4,000, or whatever the amount was, at different times. The commission he was to pay was either charged to him, or he paid it in money. I think he gave a check for the amount. Mr. Merriam did not pay us anything for negotiating that loan with Mr. Haas. I didn't consider myself employed by Merriam in any way. I considered myself as employed by Mr. Haas, for Mr. Haas's benefit, and he paid me for it.

I think Haas had his bank account with us from the time of making this loan up to the 9th of August, the time of the assignment. He had a bank book.

Exhibit "D" shown the witness.

58 I think this is the one.

Caldwell & Co. made an assignment for the benefit of their creditors; I think on the 9th day of August.

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Mr. Haas drew a draft or authorized a draft to be drawn on Mr. Merriam for the balance of $2,000, or whatever it was; either he drew it himself, or it was drawn under his direction. I suppose he signed it, but am not positive. That was about the last of July or first of August of that year. It was drawn on Mr. Merriam for 2,000 dollars. At the time of drawing the draft, Mr. Haas was in the office, and brought in, I think, policies of insurance assigned for Mr. Merriam's benefit, and the draft was drawn under Mr. Haas's instructions. I cannot recollect the conversation, the whys and wherefores.

We bought the draft of Mr. Haas—took it absolutely of him; the money was put in the bank book to his credit.

He drew against it by checks afterwards, and drew out a portion of it. That draft was paid by Mr. Merriam. At the time of the assignment there was a balance due Mr. Haas.

59 Question. What disposition was made of that balance in the deed of assignment of the firm of Caldwell & Co.?

(Objected to by defendants' counsel, as not the best evidence, and also as immaterial. Answered, subject to those objections.)

Answer. We preferred Mr. Haas, in our first-class of preferred creditors.

Exhibit "D" shown witness.

The first entry in this book on the debit side refers to the first payment made by Mr. Merriam to Mr. Haas.

The second entry, on the opposite side, is the commissions that Mr. Haas paid us for negotiating the loan.

This entry on the third page of the book refers to the draft we purchased of Mr. Haas, the amount paid for the draft. The entries on the opposite side refer to the checks drawn by him. Some of these checks were over-drafts drawn by our consent in anticipation of the money he represented he was going to have of Mr. Merriam.

We passed the sum of $2,000 to Mr. Haas's credit August
60 1st, of that year. There must be a mistake in the entry
on this bank book, for we were not doing business at that
date. Mr. Haas kept this book himself. I think it was delivered to him immediately after the making entry of the $2,000.

Cross-examination.

I had known Mr. Merriam personally only a few days before the loan was negotiated. My impression is, that Samuel Mayall introduced me to Mr. Merriam, or he brought letters introducing himself. I cannot recollect who introduced him. He had conversations with me several times about loaning money here; said he had money which he might loan. He made no general deposit with us. I think he deposited a couple of small drafts of some fifty dollars or so. Think some money was paid in on his account.

Afterwards, after the loan to Mr. Haas, he kept a small account with us; could not state the time—not a great while. Think there was an open account with him up to the time of the assignment. He is not named, as I know of, in the assignment. We were

61 not owing him at the time of the assignment; but he was
owing us. I am unable to say whether or not Mr. Haas
kept an account with us previous to the loan.

I was present at a time when Mr. Haas and Mr. Merriam were negotiating this loan. They agreed on the terms of the loan themselves. They made the contract. Don't recollect that I was present when the writings were drawn between them.

Mr. Merriam stated that his residence at that time was Boston, Massachusetts.

Don't know that he gave us any instructions relative to some policies of insurance, which Haas was to leave with us; don't recollect about it. Don't recollect whether Merriam made any arrangements to ascertain whether the building was properly insured or not.

Exhibit "C" shown witness.

This signature is in my handwriting, and the body of the writing is mine.

We must have had the policies in our possession, or we should not
have given a receipt for them. Independently of the re-
62 ceipt. I think there were policies left with us. These policies
were in our possession on the 17th of January, 1860. Cannot say whether I did or did not receive the renewals of the policies. My impression is, that Mr. Haas told us he was going to get them renewed; he said something about it. I saw Mr. Merriam when he was here last spring. He took what policies we had of his, either personally or by order. We had other policies belonging to him at different times.

I cannot tell more definitely who signed that draft; have never seen it from that time, to my recollection.

At the time we sent the draft east, we sent it to New York for collection, and advised Merriam that the draft was drawn on him. Don't recollect whether or not we advised Merriam that the policies were left with us.

Am not positive whether we paid Mr. Haas any money at the time the draft was drawn or not. He may have drawn money out. The understanding was, that he was to draw money out when he
wanted it.

63 My brother was the only other member of our firm. I think
he was in New York; he left for there about that time. He
was in St. Paul at the time of the negotiation of the loan. At the *the* time the draft was bought, I think the bargain, the conversation, was with me. Mr. Turrell was in the office, and probably made the entries, and did the writing. All the overdraws of Mr. Haas were paid by us upon the assurance of Mr. Haas that he was to have the 2,000 dollars; afterwards they were paid, because he had money there. In saying that Mr. Haas kept this bank book himself, I don't mean that he made the entries in it, but that he had it in his possession. I think we had one collection for Mr. Merriam in our possession against Mr. Chute, of St. Anthony. Merriam may have left the note with us. Merriam made several other loans about the time this was

made. It was on those other loans that the other policies of
64 insurance I have spoken of were left with us. He made as
many as three other loans to my knowledge; they were made
through my intervention. I think Merriam left a portion of the
policies of insurance with us, and some of the policies were left by
the parties obtaining the loan. Merriam left some with us for a few
days, and then took them home with him. Only that loan of Mr.
Haas was left uncompleted at the time Merriam went home, to my
recollection. I did not mean, in my statement that Merriam took
what policies we had of his, that he took them last spring, but that
he took them at different times. I don't think there were any renewals
of other policies than those of Mr. Haas left in our possession.
Cannot say in regard to his policies. Mr. Merriam sometimes, and I
don't know but in all cases, consulted us in regard to the securities
in making his loans. I went up with him, and showed him the
property in the Haas case. He talked with us about property
65 of different individuals offered as security, before the loans
were effected. Merriam may have left notes and mortgages
with us to deposit in our vault for a day or two. When he went
east he took them with him. We have had letters from Merriam
back and forth in relation to his business, and I presume in relation
to his loans. He had an interest here before coming out; had loaned
money through his son-in-law. We had letters from him subsequent
to his making these loans.

Re-direct examination.

The money I spoke of, as paid in on Merriam's account, was paid
in subsequent to the negotiation with Haas; think no money had been
paid in up to that time. What Merriam owed us at the time of the
assignment was put in among our assets. I meant before that he was
not in among our creditors. In saying other loans were made
through our intervention, I mean that we recommended the
66 men and the loans as good to Merriam. When Merriam asked
me about the security in the Haas loan, I expressed to him
the opinion that the security was good; also that Haas was a saving,
prudent German, of a good class to loan to. I think I recommended
to Merriam to take Haas's loan. The Mr. Turrell I have spoken of
was our cashier of the bank at that time. When Merriam went
home, after making his loan, I think he took everything that was
complete of the papers in regard to loans. When Merriam made
loans he drew drafts on the east. He didn't deposit any money with
us; he drew a draft for each particular loan, if I recollect right.
I think the drafts passed through our hands with the consent of the
parties, who requested us to pass the proceeds of them to their
credit. I think he sold the drafts himself, and loaned parties currency.
We had several of his drafts; we bought them out and out,
either of him or of the parties who received them from him.
67 I am acquainted with Mr. Merriam's signature.

Exhibit "A" shown witness.

I think this signature is Mr. Merriam's.

E. CALDWELL.

Sworn and subscribed before me this 15th day of February, 1861.
GEO. W. PRESCOTT,
Commissioner.

Hearing continued until to-morrow morning, at 10 o'clock.
GEO. W. PRESCOTT, *Com'ss'r.*

SATURDAY MORNING, *February 16th*, 1861.

Hearing resumed.

O. B. Turrell, duly cautioned and sworn, (called on the part of the plaintiff,) deposes and says: I am acquainted with the plaintiff and defendant in this case.

I know the late banking firm of Caldwell & Co.; knew them in summer of 1859, from May to August, and along. I was in
68 their employ; was book-keeper and cashier in their bank.

I knew something about a transaction between Caldwell & Co. and Mr. Haas relative to money to be obtained from Merriam on the mortgage described in the complaint. It was in July, 1859. My knowledge is about the money to be obtained from Mr. Merriam.

I know that Caldwell drew a draft on Mr. Merriam for 2,000 dollars, and placed the 2,000 dollars to Mr. Haas's credit on our books, and sent the draft to our New York correspondent to be collected in Boston.

I knew, from the conversation that occurred at my desk between Haas and Caldwell, that Haas was to have this money of Merriam; this was, to be best of my recollection, on the 30th July.

I know that that draft was paid.

I know that Mr. Haas called at the bank on that day, but I do not know the conversation that occurred between Haas and Caldwell. Heard them talking upon the subject of this money, but don't
69 know what was said.

This 2,000 dollars was placed to Mr. Haas's credit on our books, under date of 1st August. I have a memorandum, in my own handwriting, made by me at the time of this entry in favor of Mr. Haas.

Witness refers to a blotter containing original memoranda from which the day book was written up. The entry here, which enables me to remember this circumstance of the credit to Mr. Haas, is on the credit or receipt side of the book, "George Haas credited with 2,000 dollars in cash." This entry is made under date of August 1st, 1859; this was on Monday.

Witness, referring to same book, says, I find in my own handwriting, in this book, that under date of 30th July, 1859, Haas is charged with 250 dollars cash; this was Saturday.

My recollection is that the draft was drawn in the afternoon of that day; or if not, was not passed to the credit of Mr. Haas until after business hours, and therefore went under the head of the next
70 business day. We usually closed the transactions of the day upon our books between 3 and 4 o'clock, and all business

transacted after that, was carried on to our books as next day's business.

I find in this book eighteen entries of transactions that occurred on Saturday, which were carried over in that way to Monday, which is a reason why I am positive in regard to this particular transaction. It was a frequent occurrence in our business at that time for transactions to be so carried forward on our books. I know this practice prevails in some banks, and think it is a general practice.

I was clerk and cashier in Caldwell & Co.s' bank about 16 months. Have been employed in the bank of Kent, State of New York. That is a chartered bank; was employed there about two years as deputy cashier.

Mr. Haas kept a bank account with Caldwell & Co.

Exhibit "D" shown to witness. I recognize this as Mr. Haas's bank book. The entries in this book are all in my handwriting, except two. Those two are date of June 18th and June 20th, on
71 second page of writing; first, for $225, and second, for $200.

The first entry on third page I recognize as my handwriting. This is the same $2,000 I have spoken of as passed to the credit of Mr. Haas. The date does not correspond with the date in blotter. It is an error. I know it is an error, because the date is not the same as in the blotter, in the first place; and in the second, because Messrs. Caldwell were not doing business at the time it is dated.

The transaction referred to by this entry was on the 30th July. It was not my intention, at the time I made this entry, to date it ahead. I was not instructed by Mr. Haas, nor by Mr. Caldwell, nor by any one, to make this entry under a date ahead. My habit was to return the-book to the depositor after making an entry on the debit side of the pass-book, that is, a credit in the bank book. I do not know of any reason why that entry should have been made under a date ahead.

The entries on the fourth page of writing in this book refer
72 to moneys drawn out of the bank by Mr. Haas on checks.

Exhibits annexed, marked E, T, G, H, I, and J, respectively shown witness, who says:

I recognize these as the checks upon which the moneys, charged on said page four of this pass-book, were drawn. I am acquainted with Mr. Haas's signature. Have seen him write his name. Not very often. I usually paid Mr. Haas's checks from May, 1859, to the close of the business in August. The signatures to these checks are Mr. Haas's signatures. I recollect that some of these checks were presented personally by Mr. Haas, and were paid to him. I am the assignee of Caldwell & Co. I have had possession of their books and papers most of the time since the date of the assignment. There is no memorandum, within my knowledge of the draft spoken of as drawn on Merriam. The draft is not in our regular draft book.

Question. Why was not this draft drawn in the regular draft book?

(Objected to as immaterial.)

73 Answer. It was not the custom to draw drafts from the

bank forms except on regular correspondents. Mr. Merriam was not a regular correspondent. I mean by regular correspondents, banking-houses, where we keep accounts.

Cross-examination.

I am acquainted with Mr. Merriam. I first got acquainted with him in the month of May, 1859. Can't state exactly how long he was in St. Paul at that time; perhaps from two to three weeks, may be not so long. He was in Saint Paul at that time. He was frequently in Caldwell's bank during that time; nearly every business day. He made some deposits with them. While he was there he kept all his papers tied in a bundle, and usually went and put them in the vault himself, and took them out. Did in all cases that I remember. I cannot state that the Caldwells corresponded with Merriam, after his return east, about his loans. It was a class of correspondence out of my range of business. I know that Mr.
74 Haas left some policies of insurance with them. I saw Mr.
Merriam last spring, when he was here. I don't know that he transacted any business with them then. He got some papers, but my impression is that he got them of me. I can't state exactly what he got, but think they were some insurance policies, and I think one mortgage of Mr. Chute, of St. Anthony. There may have been other papers, but I cannot state. Cannot state whether or not Mr. Haas's papers were among those then delivered. I don't remember the date of the loan to Mr. Haas. (Exhibit D shown the witness.) My impression is that Mr. Merriam did not deposit this 4 000 dollars, on 1st page, previous to the loan. I don't know that Caldwells made any loans for Merriam after his return home. I think they received about 200 dollars on his account after he left, as a collection.

Re-direct examination.

The deposits I spoke of, as made by Merriam, were two or three small deposits made by him while he was here. He
75 did not make any others at that time. The papers that I
spoke of as left for Merriam were papers left for safe-keeping. My impression is, that when he left for home in the spring of 1859 he took with him what papers he had in the bank; last spring he took away what papers he had from Mr. Caldwell's office. I am acquainted with the contents of the deed of assignment of Caldwell & Co.

Question. By that deed of assignment is Mr. Haas, the defendant, a preferred creditor of Caldwell & Co. for the balance which appears to be his due by this book marked Exhibit "D"?

(Objected to as not the best evidence and as immaterial.)

Answer. He is preferred in their assignment. I can't state that it is exactly this balance. My recollection is that it is about the amount of this balance.

Cross-examination.

Question. State whether before the 30th of July, 1859, it was

understood at the bank that Mr. Haas was to receive this
76 $2,000 from Mr. Merriam through Messrs. Caldwell & Co.?
(Objected to as immaterial.)

Answer. I cannot state definitely the understanding. I had the impression that he was to receive it through Caldwell & Co. I can't tell what they knew about the transaction, but I got the impression that Hass was to receive through them.

Re-direct examination.

I can't state the sources of my impression, whether it was from overhearing conversations, or from what any one or all of them told me. Cannot state how I got the impression. Don't know that I got it from anything Mr. Merriam said to me. Don't recollect anything that Mr. Merriam ever said that the money was coming through them. I heard Mr. Caldwell talk most about that loan. Did not hear Haas talk much about it, but am under the impression I did hear him speak of it.

O. B. TURRELL.

Subscribed and sworn to before me this 16th day of February, A. D. 1861.

GEO. W. PRESCOTT,
Commissioner.

77 Defendant expressly admits, by his counsel, that pass-book marked Exhibit "D" was produced by him, and has been in his (defendant Haas's) possession. Pl'ff puts same in evidence. Plaintiff also puts in evidence agreement, marked Exhibit "A." Defendant admits that it was executed and delivered to defendant Haas on the day it purports to have been executed.

George Haas recalled, on part of the defendant.
(Plaintiff objects to his testimony because he is a party and incompetent.)
Witness testifies as follows, Louis Krieger interpreting:
I was in Caldwell's bank three or four times on the 30th July, 1859. Mr. Sauer was with me two or three times. I was there, between 2 and 3 o'clock, when I delivered the policies. It was before
the bank was closed. I did not draw any draft on Merriam for
78 2,000 dollars. I did not sell to the Caldwells such a draft;
nor did I sell them the claim for 2,000. Had no talk with
Caldwell about doing it. I found out that Merriam had paid the draft by the letter written by him to me. Exhibit ' D'' shown witness, who says: I did not make these figures in pencil upon fourth page of writing.

GEORGE HAAS.

Subscribed and sworn to before me this 16th day of February, 1861.

GEO. W. PRESCOTT,
Commissioner.

Anton Sauer, recalled for defence, says: I was in Messrs. Caldwell's bank on 30th July only 3 times that I can recollect. Mr. Haas did not draw any draft, nor authorize any to be drawn, while I was there that I know of. He did not sell any draft or claim to the Caldwells that I heard of. There was no conversation by Mr. Haas with Mr. Caldwell about selling any claim or draft while I was in. I was in the last time on that day very shortly after two o'clock; it was before the closing of the bank.

79 *Cross-examination.*

I went into the bank with Haas three times on that day. I cannot tell whether I went in any time that he was in. We went in the first time in the morning; the second time was about 12 o'clock. It was not much after 2 the last time I went in. Mr. Haas said nothing to Caldwell the last time but to tell him to write on to Merriam for the money. One time we went in in the morning, and there was a talk about the policy, and the second time there was a mistake in the policy, and the third time we got the 250 dollars.

ANTON SAUER.

Subscribed and sworn to before me this 16th day of February, 1860.

GEO. W. PESCOTT,
Commissioner.

District of Minnesota, *ss:*

The said several parties in this said cause declared that they had no more testimore to produce before me, the said commissioner
80 heretofore named, and I accordingly return the foregoing testimony as the whole of the testimony in connexion with the exhibits therein testified to and hereto annexed, introduced by said parties. And I do further certify that said parties, plaintiff and defendant, appeared before me, by their counsel, at the times and place, and in all respects as herein set forth, and that the testimony of said witness was by me reduced to writing, as it was given, and was therefore signed by them, and that said witnesses previous to testifying were each duly sworn in said cause to depose the whole truth, and nothing but the truth.

To all which witness my hand this sixteenth day of February, in the year of our Lord eighteen hundred and sixty-one.

GEO. W. PRESCOTT,
Commissioner.

81 *Exhibit "A."*

Having this day loaned George Haas six thousand dollars, and taken from him a mortgage to secure the same, and having furnished and paid the said Haas only four thousand dollars of said loan, and agreed to furnished and pay him the balance as soon as he shall have completed the building now in process of erection on the west half of lot eleven, in block twenty-four, in Saint Paul, proper—

I hereby bind myself to pay the said balance, viz: two thousand dollars, as soon as said building completed, and good insurance thereupon is effected for four thousand dollars, and transferred to me.

CHARLES MERRIAM.

St. Paul, May 24th, 1859.

(Written in pencil at foot of this exhibit:) "When recorded, refer to it on the margin of a mortgage given by Haas to Merriam in May last."

82 OFFICE OF REGISTER OF DEEDS,
Ramsey Co., Min.

I hereby certify that within agreem't was filed in this office for record on the 11th day of November, A. D. 1859, at 11¼ o'clock a. m., and was duly recorded in book "A" of miscellaneous, page 127.

EDWARD HEENAN,
Reg'r of Deeds.

Exhibit "B."

BOSTON, *Aug.* 13, 1859.

GEO. HAAS, Esq.:

DEAR SIR: Your telegraph came to hand last evening. Mess. Caldwell & Co. drew upon me on the 30th for $2,000, for your account, and I supposed they had paid the amount before drawing, as they informed me that you had caused insurance to be made agreeable to our understanding. This matter was entirely separate from their business, and should not have been mingled.

83 I have written them to day, and as it was a matter of trust only I presume they will immediately pay. If they do not, or have not, please write to me.

Yours, truly,

CHARLES MERRIAM.

Exhibit "C."

Received, St. Paul, Jan. 17th, 1860, from Geo. Haas, esq., policy No. 12759, in Girard Fire & Marine Ins. Co., Philadelphia, for $2,625. Also policy No. 5, Indemnity In. Co., of Albany, New York, for $2,625. Also policy No. 366, City Fire In. Co., of New Haven, Con., for $1,800, all of which are assigned or made payable in case of loss to Charles Merriam, of Boston, Mass.; the above left with us for safe-keeping.

CALDWELL & CO.

84 *Exhibit "D."*

Dr. *Caldwell & Co.'s bank in account with Geo. Haas.* *Cr.*

(Page 1.)			(Page 2.)		
May 25	To Merriam	4,000 00	May 25	Record, Merriam	1 50
June 4	" Currency error	135 00	25	Commission	75 00
			25	G. E. Warren	1,866 58
			25	William	683
			25	Metc'f	410
			28		350
			June 4	Cmo	135
			5		175
			18		225
			20		200
			July 1	Balance	13 92
		4,135 00			4,135 00
July 1	To balance	13 92		To cash in full, J'ry 9	13 92

(Page 3.)			(Page 4.)		
Aug. 30	By cash	$2,000	J'y 13	To ch'k	76 96
			" 20	" "	13
			" 30	" "	250
			A'g 5	" "	50
			6		128
			7		307 50

85 *Exhibit "E."*

No. . Saint Paul, *July*, 13, 1859.

Caldwell & Co. pay to myself, freight or bearer, seventy-six $\frac{96}{100}$ dollars in current bank notes.

$76 96. GEORGE HAAS.

Exhibit "F."

No. . Saint Paul, *July* 19, 1859.

Caldwell & Co. pay to 'self, or bearer, fifteen $\frac{}{100}$ dollars in current bank notes.

$15. GEORGE HAAS.

Exhibit "G."

No. . Saint Paul, *July* 30, 1859.

Caldwell & Co. pay to 'self, or bearer, two hundred and fifty $\frac{}{100}$ dollars in current bank notes.

$250. GEORGE HAAS.

2439

86 *Exhibit "H."*

No. . SAINT PAUL, *Aug.* 5, 1859.

Caldwell & Co. pay to cash, or bearer, fifty $\frac{}{100}$ dollars in current bank notes.

$50. GEORGE HAAS.

Exhibit "I."

No. . ST. ANTHONY, MIN., *Ag.* 5, 1859.

Caldwell, Whitney & Co.'s Bank pay to cash, or bearer, one hundred and twenty-five dollars in bank bills.

$125. GEORGE HAAS.

Edwin Caldwell, I. E. Whitney, Albert Caldwell. C. H. Parker, attorney-at-law.

Exhibit "J."

No. . ST. ANTHONY, MIN., *Ag. 8th*, 1859.

Caldwell, Whitney & Co.'s Bank pay to ex'ge, or bearer, three hundred and seven and $\frac{50}{100}$ dollars in bank bills.

307\frac{50}{100}$. GEORGE HAAS.

Edwin Caldwell, I. E. Whitney, Albert Caldwell. C. H. Parker, attorney-at-law.

87 And afterwards, to wit, on the twenty-fourth day of April, in the year one thousand eight hundred and sixty-two, came the said plaintiff, by his said solicitors and counsel, and filed in the clerk's office of said court, at said St. Paul, his petition for appeal to the Supreme Court, in words and figures following, to wit:

88

89 CHARLES MERRIAM, plaintiff and appellant,
vs.
GEORGE HAAS and MARY HAAS, his wife, defendants and appellees. } In equity.

To the honorable the Supreme Court of the United States:

The petition of appeal of Charles Merriam, the above-named plaintiff and appellant, respectfully showeth:

That heretofore, to wit, at the June term of the year A. D. 1861, of the district court of the United States for the district of Minnesota, a final decree was rendered by said court, sitting in equity, in a certain cause therein pending, wherein your petitioner was plain- ff, and George Haas and Mary Haas, his wife, were defendants; hich said decree, so far as it sustains the defence of the said defendants in their answer set forth to a part of the claim in the plaintiff's bill of complaint made, and allows the plaintiff to have a decree duly in accordance with the admissions of said defendants in their said answer contained, and does not grant all the relief prayed for 90 in said bill, is erroneous and ought to be reversed, as your petitioner is advised, and that the matter thereby in dispute, exclusive of costs, exceeds the sum of two thousand dollars.

Wherefore this appellant appeals from the said decree of the said court, so far as the same is hereinbefore complained of, to the Supreme Court of the United States, next to be holden at the city of Washington, in the District of Columbia, and prays that the said decree, and a transcript of the bill of complaint, answer, pleadings, depositions, evidence, and all other proceedings of what kind soever in the said cause may be duly transmitted to the said Supreme Court, and that the said Supreme Court may receive, hear, and determine said appeal, and that so much of the said decree as is hereinbefore complained of may be reversed, and that such other or further order and decree may be made by the said Supreme Court, in the premises, as the nature of the case may require and as may be 91 agreeable to equity, and that this appellant may be restored to all things which he hath lost by the part of said decree above complained of, and may have all the relief which he hath prayed for in his said bill of complaint.

And this appellant will ever pray, &c.

ALLIS & PECKHAM,
Solicitor and of Counsel for Plaintiff.

And afterwards, to wit, on the twenty-fourth day of April, A. D. 1862, came the said plaintiff, by his said solicitors, and filed in the clerk's office of said court the following order, viz:

District court of the United States for the district of Minnesota.

CHARLES MERRIAM, plaintiff, *vs.* GEORGE HAAS and MARY HAAS, his wife, defendants.	In equity.

In this cause, this 24th day of April, A. D. 1862, came the 92 plaintiff, by his solicitors and counsel, Messrs. Allis & Peckham, and exhibiting his petition praying for an appeal to the Supreme Court of the United States, next to be holden at the city of Washington, in the District of Columbia, on the first Monday of December, A. D. 1862, from so much of the final decree heretofore rendered in this cause as in said petition is complained of, and showing that the matter in dispute, exclusive of costs, exceeds the sum of two thousand dollars, and furnishing the security required by law, moved that an appeal be allowed, in accordance with the prayer of said petitioner; and thereupon it is ordered that the appeal prayed for be, and the same is hereby, allowed, and that the appellant serve the usual citation, according to law.

R. R. NELSON,
U. S. Judge.

93 UNITED STATES OF AMERICA,
District of Minnesota.

And now, to wit, at a stated term of the district court of the United States for the district of Minnesota, held at Saint Paul, in said district, on the first Monday in October, A. D. 1862, on the first day of said term, it was ordered that the record in said cause, together with others, be, and the same is hereby, transferred to the circuit court of the United States for the district of Minnesota, in pursuance of an act of the Congress of the United States approved July 15th, A. D. 1862, entitled "An act to amend an act of the third of March, A. D. 1837, entitled an act supplementary to an act entitled an act to amend the judicial system of the United States.

95 UNITED STATES OF AMERICA,
Circuit court of the United States for the
district of Minnesota, ss:

I, H. E. Mann, clerk of said circuit court for the district of Minnesota, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a true and complete transcript of the record, process, pleadings, orders, final decree, and all other proceedings in said cause, and also of all the depositions, exhibits, and proofs taken therein, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation of appeal, together with the proof of the service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

[SEAL.]

H. E. MANN, *Clerk.*
By J. N. CARDOZO, *Deputy Clerk.*

96 No. 190.—*Certiorari and return.*

THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judge of the district court of the United States for the district of Minnesota, greeting:

Whereas in a certain suit in said district court, between Charles Merriam, complainant, and George Haas and *ux.*, defendants, which suit was removed to the Supreme Court of the United States, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The omission of the decree of said court for the sale of the mortgaged premises, and the sale of the said premises and the proceedings under said decree."

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Roger B. Taney, chief justice of said Supreme Court, this 19th day of May, A. D. 1863.

WM. THOS. CARROLL,
Clerk Sup. Court U. States.

97 [SEAL.] The answer of the judges of the circuit court of the United States for the district of Minnesota, in the 9th circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States, within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court, at St. Paul, in the district of Minnesota, this 10th day of November, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-eighth year.

H. E. MANN, *Clerk.*

Fees, $4 50.

98 *Schedule.*

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Minnesota.

CHARLES MERRIAM
vs.
GEORGE HAAS and WIFE.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered, that on the sixth day of October, A. D. 1862, came the clerk of the district court of the United States of America, in and for the district of Minnesota, and filed in the clerk's office o said circuit court certified copies of a certain entry and decree made and entered in said district court, in the words and figures following, viz :

And afterwards, to wit, at a stated term of this court, held at Mankato, June, 1861, on the second day of said term, the following proceedings, among others, was had :

99 *Forclosure of mortgage in chancery.*

CHARLES MERRIAM
vs.
GEORGE HAAS and WIFE.

This cause came on to be heard at this term upon the issues joined, and testimony taken herein, and was argued by L. Allis, esq., of counsel for plaintiff, and by C. D. Gilfillan, esq., of counsel for defendant, and submitted to the court.

And afterwards, to wit, at the present term, it is upon consideration considered and adjudged by the court that the said defence of defendant in his answer set forth is sustained, and that the plaintiff is entitled to his decree and judgment in accordance with the admissions in said answer.

It is therefore ordered that this cause be, and it is, referred to the clerk of this court, who is a master hereof, to compute and re-
100 port the amount due the plaintiff for principal and interest as
in said answer set forth and admitted. The said master makes report in writing that he has computed the amount due the plaintiff at this date upon the note and mortgage in said complaint described, under the ruling of the court in this cause, to be the sum of five thousand two hundred and seventy-one dollars and six cents. It is therefore upon inspection thereof, and on motion of plaintiff's counsel, ordered that said report be, and it hereby is, confirmed.

It is therefore, on motion of Allis and Peckham, of counsel for said plaintiff, further ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest, and costs in this cause, and which may be sold separately without material injury to the parties interested, be sold at auction under the direction of a master in chancery of this court, unless said mortgagor, previous to such sale, shall pay to the said plaintiff the said sum of five thousand two hundred and seventy-one dollars and six cents, and interest thereon from this date, together with his costs in this cause to be taxed.

And it is further ordered that said sale be made according to the rules and practice of this court. That said master give pub-
101 lic notice of the same by advertisement published in some
newspaper printed in the city of Saint Paul, in said district, at least once in each week for six successive weeks previous to the day of sale, that the plaintiff or any of the parties to this cause may become the purchaser at said sale. That said master execute a deed or deeds to the said purchaser or purchasers of the mortgaged premises after the expiration of one year from said day of sale, unless the same shall have been previously redeemed pursuant to law and the rules of this court. That said master out of the proceeds of said sale, after satisfying any priorliens upon said premises, pay to the plaintiff or his solicitor his costs in this cause to be taxed, and also the aforesaid sum of five thousand two hundred and seventy-one dollars and six cents, and interest thereon from this date to the day of such sale, or so much thereof as the purchase money of said mortgaged premises will pay, and file receipt therefor with his report of sale, and that he bring the surplus moneys, if any there be, into court without delay, to abide the further order of the court.

And it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming or to claim from or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, unless the same shall be redeemed within one year as aforesaid.

102 And it is further ordered, adjudged, and decreed, that the purchaser or purchasers of said mortgaged premises at such sale be let into the possession thereof, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the deed of said master for such premises, and a certified copy of the order confirming the report of sale in this cause.

And it is further ordered that in case said mortgager, or any person lawfully claiming through or under him, shall not, within eight days after said sale, pay or cause to be paid to said purchaser or purchasers at said sale the interest upon the amount of said sale or purchase for one year, at the rate of twelve per cent. per annum, then the said purchaser or purchasers shall be let into the immediate possession of the said premises, and of the use and profits thereof.

And it is further ordered and decreed that if the moneys arising from said sale are insufficient to pay the amount due to the plaintiff as aforesaid, for principal and interest and costs, that said master specify the amount of such deficiency in his report of the sale, and on the coming in and confirmation of said report, the defendant George Haas, who is personally liable for the payment of the debt 103 secured by said mortgage, pay to the plaintiff the amount of such deficiency, with interest thereon from said day of sale, and that plaintiff may have execution therefor.

The description of property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows: Lands and real estate, with their appurtenances, situate in the county of Ramsey and State of Minnesota, to wit. lots one (1) and two, (2,) in block twenty-nine (29) in Rittson's addition to St. Paul, according to the plat thereof on record in the office of the register of deeds for the county of Ramsey aforesaid, and also the west half of lot eleven, (11,) in block twenty-four (24) in St. Paul proper, having twenty-five (25) feet front on Third street, and a depth of one hundred and fifty feet, according to the plat thereof on record in the office of the register of deeds of Ramsey county aforesaid.

R. R. NELSON, *Judge.*

Annexed to which certified copies of said entry and decree was the following, among other orders and entries, with the following certificate thereto attached:

104 And afterwards, to wit, at a stated term of the U. S. dist. court, held at Saint Paul, Oct. term, A. D. 1862, on the first

day of said term, it was, among other things, ordered that the clerk of the said district court deliver to the clerk of the circuit court all files and papers in all cases pending in said district court at the time of the passage of the act of Congress creating said circuit court in this district, together with certified copies of all orders, judgments, decrees, or entries in said causes, and that the clerk of said district court have judgment in this court for all costs accrued to him in said causes.

Now, therefore, I, James W. Taylor, clerk of the U. S. district court, do hereby certify that the foregoing is a true copy of all entries, orders, rules, in the above-entitled cause, as appears by the records in this office.

{ Seal U. S. Dist. Court, Dist. Minnesota. } Witness my hand and the seal of the court this 6th day of October, A. D. 1862.

JAMES W. TAYLOR, *Clerk.*

And afterwards, to wit, on the 19th day of November, A. D. 1862, came James W. Taylor, esq., master in chancery of said circuit court, and filed in the clerk's office of said circuit court his report of sale in the words and figures following, to wit:

105 *Report of sale.—Sale made November* 15, 1862.

CIRCUIT COURT OF THE UNITED STATES,
District of Minnesota:

CHARLES MERRIAM
vs.
GEORGE HAAS and MARY HAAS, his wife.

To the honorable judges of the circuit court of the United States for the district of Minnesota:

The undersigned, master in chancery of said court, would respectfully report that, pursuant to the decretal order of the district court of the United States (siting in equity) for the district of Minnesota aforesaid, made at the June term, A D. 1861, in the above-entitled cause, (which cause, with all further proceedings therein, was by the act of Congress approved July 15, 1862, transferred on the first day October, A. D. 1862, to the circuit court of the United States for the district of Minnesota,) I did, on the fifteenth day of November, in the year eighteen hundred and sixty-two, at eleven o'clock in the forenoon, sell at public auction, at the front entrance to the usual place of holding said United States circuit court, in Brown's block, in the city of Saint Paul in said district, to the highest cash bidder, the
following described lands and real estate, with their appurte-
106 nances, situate in the county of Ramsey and State of Minnesota,
to wit: All and singular the following described lands, to wit, the west half of lot eleven, in block twenty-four, in Saint Paul proper, having twenty-five feet front on Third street, and a depth of one hundred and fifty feet, according to a plat on record in the office of the register of deeds of Ramsey county aforesaid.

That I first gave public notice of the time, manner, place, and terms of said sale by causing such notice to be published in the "Pioneer and Democrat," a newspaper published in the city of Saint Paul, in said district, once in each week for six successive weeks prior to said day of sale, a copy of which notice, with the affidavit of such publication, is hereto annexed and filed with this report.

That at said sale said property, being a part of the property described in the bill of complaint as the mortgaged premises in said cause, was offered publicly to the highest bidder, and the same was struck off and sold to Charles Merriam, the plaintiff in this suit, for the sum of five thousand eight hundred and twelve dollars and forty one cents, he being the highest bidder, and that being the highest sum bidden therefor; and said sum being sufficient to satisfy the amount of the decree in this cause, I did not offer the balance of said premises described in said mortgage.

And I have executed the usual master's certificate for said premises to said purchaser.

107 That out of said purchase money I have paid the expenses of advertising and making said sale, amounting to the sum of twenty-seven dollars; that I have paid the taxed costs in this cause, amounting to fifty-five dollars and seventy-seven cents; and that the balance of said purchase money, being the sum of $5,729 64, the plaintiff, by his solicitor in this cause, has applied in full satisfaction and discharge of the judgment and decree of said court, and I accordingly report the same fully paid and satisfied.

Recapitulation.

Amount of decree			$5,271 06
Interest to day of sale, 1 year, 5 mo's, and 12 days			458 58
Amount bid for premises sold		$5,812 41	
Advertising sale	$11 50		
Master's fees for sale and report	15 50		
Taxed costs in the cause	55 77		
		82 77	
		$5,729 64	$5,729 64

All of which is respectfully submitted.

JAMES W. TAYLOR,
Master in Chancery.

St. Paul, *Nov.* 15, 1862.

Attached to which report of sale and filed therewith was the affidavit of F. L. Goodrich, in the words and figures following:

State of Minnesota, City of Saint Paul,
County of Ramsey, ss:

108 F. L. Goodrich, being duly sworn, deposes and says that the annexed printed copy of an advertisement—chancery sale—

was cut from the columns of the "Pioneer and Democrat," (a newspaper printed in the city of Saint Paul, county of Ramsey and State of Minnesota, and the seat of government of said State,) and that the same was published in said newspaper as an advertisement for six successive weeks, at least once in each week, and that the first publication of the said advertisement was made on the 3d day of October, A. D. 1862, and the last publication was made on the 15th day of November, A. D. 1862; and that during the whole time of the said publication he was foreman of the said newspaper.

F. L. GOODRICH.

Subscribed and sworn to before me, this fifteenth day of November, A. D. 1862.

JAMES W. TAYLOR,
U. S. Commissioner.

Which printed copy of an advertisement annexed to said affidavit is in the words and figures following:

Chancery Sale.

Circuit court of the United States for the District of Minnesota, *ss:*

CHARLES MERRIAM
vs.
GEORGE HASS and MARY HASS, his wife.

109 *Foreclosure in chancery.*

Decree—June term, A. D. 1861—$5,271 06, with interest and costs.

Pursuant to the decretal order of the district court of the United States for the district aforesaid, made in this cause at the June term, A. D. 1861, the undersigned, master in chancery of said court, will sell at public auction, to the highest cash bidder, on Saturday, the fifteenth day of November, 1862, at 11 o'clock in the forenoon, at the front entrance to the place of holding said court in Brown's block, Third street, in the city of Saint Paul, in said district of Minnesota, the following described premises, to wit:

All and singular the following described lands and real estate, with their appurtenances, situate in the county of Ramsey, in the State of Minnesota, to wit: The west half of lot eleven, in block twenty-four, in Saint Paul proper, having twenty-five feet front on Third street, and a depth of one hundred and fifty feet, according to a plat thereof on record in the office of the register of deeds of Ramsey county, aforesaid.

Also lots one and two in block twenty-nine, in Rittson's addition to St. Paul, according to the plat thereof on record in the office of the register of deeds for the county of Ramsey, aforesaid, together with all the hereditaments and tenements thereunto appertaining.

JAMES W. TAYLOR,
Master in Chancery.
LORENZO ALLIS,
Plaintiff's Solicitor.

110 And afterwards, to wit, at rules in said circuit court, held at the office of the clerk of said court on the 1st day of December, A. D. 1862, the following proceeding among others was had:

CHARLES MERRIAM.
vs.
GEORGE HAAS and MARY HAAS, his wife. } In equity.

In this cause James W. Taylor, esq., one of the masters of this court, having returned into court his report of the sale of the mortgaged premises herein, on filing said report and on motion of Allis & Peckham, solicitors for the plaintiff, ordered, that said report be, and the same is hereby, in all things confirmed, unless cause to the contrary thereof shall be shown within the time allowed therefor by the rules and practice of this court.

And afterwards, to wit, on the fifth day of November, A. D. 1863, came the said defendant, George Haas, and paid into said circuit court the sum of $5,812 41 for the redemption of the premises sold under the decree in this cause, and filed the receipt of said 111 plaintiff, by his said solicitors, for the payment of one year's interest on the purchase money for which said premises sold; and certificate of redemption was issued by the clerk pursuant to rule of court; which said receipt, so filed as above, is in the words and figures following, viz:

STATE OF MINNESOTA,
United States Dis't Court:

CHARLES MERRIAM, compl'nt
vs.
GEORGE HAAS & WIFE, def'ts. }

Rec., St. Paul, Nov. 20, 1862, of George Haas, one of the defendants in the above-entitled cause, the sum of six hundred and ninety-seven dollars and fifty cents, being in full for interest at twelve per cent. per annum, for one year, from Nov. 15th, 1862, on purchase money on property, sold under decree of foreclosure, in the above-entitled action, on Nov. 15, 1862, by the master in chancery of said court, to complainant Merriam.

ALLIS & PECKHAM,
Solicitors for Plaintiff.

And afterwards, to wit, on the 10th day of November, A. D. 112 1863, at the chambers of the Hon. Rensselaer R. Nelson, one of the judges of the said circuit court, the following proceeding was had, viz :

UNITED STATES CIRCUIT COUIT,
District of Minnesota:

CHARLES MERRIAM
vs.
GEORGE HAAS & WIFE.

It is hereby ordered that the money paid into court in this cause be paid to the plaintiff or his solicitor.

R. R. NELSON,
U. S. Judge.

AT CHAMBERS, *Nov.* 10, 1863.

Which said last above order was on the same day, to wit, on the 10th day of November, A. D. 1863, filed and entered in the clerk's office of said circuit court.

And on the said 10th day of November, A. D. 1863, came the said plaintiff, by Lorenzo Allis, his solicitor, and received the said sum of $5,812 $\frac{41}{100}$ do. paid into court, and endorsed his receipt therefor on the order of his honor R. R. Nelson, judge, last above written, in the words and figures following, to wit:

Rec'd, St. Paul, Nov. 10th, 1863, of H. E. Mann, clerk of
113 the U. S. circuit court, fifty-eight hundred and twelve $\frac{41}{100}$ dollars, being the amount paid into court in the above-entitled suit.

LORENZO ALLIS,
Pl'ff's Solicitor.

UNITED STATES OF AMERICA,
Circuit Court of the United States,
for the district of Minnesota, ss:

I, Horatio E. Mann, clerk of the said circuit court for the district of Minnesota, do hereby certify, and return to the honorable the Supreme Court of the United States, that the foregoing is a true and complete transcript of the certified copy of the entry and final decree in said cause, and the order and certificate thereto attached, filed in the clerk's office of said circuit court, by the clerk of the district court of the United States of America for the district of Minnesota, and also of the orders, rules, and proceedings in said cause in said circuit court, subsequent to said decree, as appears from the original records and files of said court.

In witness whereof, I have hereunto set my hand and affixed the [SEAL.] seal of the said circuit court, at St. Paul, in the district aforesaid, this 10th day of November, A. D. 1863.

H. E. MANN, *Clerk.*

Fees, $4 50.

Filed December 6, 1862.

[REC. CXC, D. T. 1863.]—4

Carlisle

1 Howard — 285 —

Taylor v Savage

Moore

183 –

= 7. Howard — 184 —

8. Cowen 328

18 — Howard . 481 —

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Supreme Court of the United States.

13 Eng: C. Law. 385
4 Bing. 106

CHARLES MERRIAM, Appellant,

vs.

GEORGE HASS AND MARY HASS, his Wife, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, SITTING IN EQUITY.

Brief and Points of Counsel for Appellant.

LORENZO ALLIS,

COUNSEL FOR APPELLANT.

SAINT PAUL:
PIONEER PRINTING COMPANY,
1864.

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Supreme Court of the United States.

CHARLES MERRIAM, Appellant,

vs.

GEORGE HASS AND MARY HASS, his Wife, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, SITTING IN EQUITY.

Brief and Points of Counsel for Appellant.

STATEMENT OF CASE.

The Appellant filed his bill to foreclose a mortgage executed to him by the Appellees, on the 24th day of May, A. D. 1859, at the city of St. Paul, in the State of Minnesota, of certain premises situate in said city, to secure the payment of the principal and interest mentioned in a certain promissory note, bearing even date with said mortgage, which note the said Appellee, George Haas, made and delivered to the said Appellant, on the day and at the place aforesaid, whereby he promised to pay to the order of said Appellant, for value received, two years after the date thereof, at said city of St.

the time the loan was made, and continued to keep such bank account with C. & Co. till their assignment; said Haas paid witness a commission for negotiating said loan; no commission was paid by said Merrriam; witness was not employed by him; the $4000 first advanced by Merriam was deposited by Haas with C. & Co., and Haas afterwards drew it out from time to time on his checks; that on the last of July or the first of August, 1859, said Haas drew a draft or authorized C. & Co. to draw a draft for him, on said Merriam, at Boston, for the balance of the loan, $2000; C. & Co. bought the draft of said Haas and immediately passed the money to his credit on their books, and also on Haas' bank book, and Haas afterwards, from time to time, drew checks against the amount; at the time of their assignment there was a balance due Haas for which he was preferred; Haas' bank book was always kept by himself; it was delivered to him immediately after the entry in it of the $2000 to his credit; exhibit D is the bank book of said Haas; the first entry on the debit side is the deposit of $4000, first paid by Merriam; the entry on 3d page of the book is of the proceeds of the said draft, which C. & Co. purchased of Haas; the entries on the opposite side refer to checks drawn by Haas on C. & Co.; the date of 30th August is a clerical mistake; C. & Co. were not then doing business; the entries on page 4th refer to checks drawn against this $2000.

See printed record, pp. 19–23.

The Appellant also put in evidence the deposition of O. B. Turrell, which was to the effect: that the witness was the bookkeeper and cashier of the banking house of Caldwell & Co. for some sixteen months prior to their assignment in August, 1859; knows that on the 30th day of July, 1859, the draft for account of Haas was drawn on Merriam for $2000, and that the $2000 was placed to the credit of Haas on the books of C. & Co., and the draft forwarded to their New York correspondent for collection in Boston; knows that the draft was paid; the draft was taken and the money passed to Haas' credit on the 30th of July, which was Saturday, after banking hours, and hence went under the head of the next day's business, and therefore appears on the books of C. & Co. under the date of 1st August, which was Monday; C. & Co. usually closed the transactions of the day upon their books between 3 and 4 o'clock, and all business transacted after that hour was carried on their books to next day's business; it was a matter of frequent occurrence in their business for transactions to be carried forward in that way; exhibit D is the bank pass-book of Haas; most of the entries in this book are in witness' handwriting; the entry of $2000 on the 3d page is in witness' handwriting, and it was entered by witness on the 30th July, 1859, at the time the draft was made and taken by C. & Co.; the date in this book is a clerical error; it was not witness' intention to date the entry ahead; this $2000 was the proceeds of the draft; it was the custom of witness always to return the pass-book to the depositor after entering a deposit; the entries on the 4th page in this book refer to moneys drawn out of the bank by Haas on his checks; the exhibits E, F, G, H, I, and J, are the checks of Mr. Haas upon which the moneys charged on said 4th page of said book were drawn. And the testimony of this witness was generally corroborative of the testimony of Caldwell.

See printed record, pp. 24–27.

And it was expressly admitted by Appellees' counsel that the bank pass book marked exhibit D was produced by said Appellee, George Haas, at the taking of the depositions, and had been in his possession.

And Appellant's counsel put the same in evidence; and also put in evidence the agreement marked exhibit A, the execution of the same according to its purport being admitted.

See printed record, p. 27.

The further deposition of the witness Sauer was then put in evidence by Appellees, (see printed record, p. 28); but it contains nothing material.

For the contract made by Appellant at the date of the mortgage see exhibit A, page 28, printed record; and for the bank pass-book of Appellee, George Haas, see exhibit D, page 30, printed record.

After hearing, the Court decided in favor of the Appellees upon the issue tried, and rendered a decree in conformity with the admissions and allegations of Appellee's answer, that is, allowing the Appellant the $4000 first advanced by him and the interest thereon and disallowing the balance of his claim, to wit, the $2000 and interest thereon; and ordering sale of the premises to satisfy the debt thus allowed.

See printed record, pp. 10, 11.

From the part of the decree thus averse to the Appellant, he duly appealed to this Court. See petition and order of appeal, printed record, pp. 31, 32. And the case is now here upon the only issue made in the Court below, to wit, as to the liability of the mortgaged premises for the payment of the said $2000 and interest thereon, of Appellant's claim.

POINTS.

The Court erred in its decision of the issue tried.

The few material facts of the case may be clearly and readily gleaned from the uncontroverted statements of the pleadings, and from the evidence adduced.

They are as follows:

1st. The Appellee, George Haas, executed and delivered to the Appellant the promissory note described in the bill of complaint, being for the sum of $6,000, with 15 per cent. interest per annum, payable semi-annually; and also at the same time to secure the payment of said note, he, together with his wife, executed to the Appellant the mortgage described in said bill.

2d. After the execution of said note and mortgage, and on the same day the Appellant executed and delivered to the Appellee, George Haas, a certain agreement in words and figures, as follows, viz.:

"Having this day loaned George Haas six thousand dollars, "and taken from him a mortgage to secure the same, and "having furnished and paid the said Haas only four thousand "dollars of said loan, and agreed to furnish and pay him the "balance as soon as he shall have completed the building now "in process of erection on the west half of lot eleven, in block "twenty-four, in St. Paul proper, I hereby bind myself to pay "the said balance, viz.: two thousand dollars, as soon as said "building is completed and good insurance thereupon is "effected for $4000 and transferred to me.

"CHARLES MERRIAM.

"St. Paul, May 24, 1859."

3d. On the 30th July following said Haas took policies of insurance assigned to Appellant on the building referred to in the foregoing contract, to Messrs. Caldwell & Co., bankers, in said St. Paul, with whom the said Haas then had a bank account, and either drew a draft or instructed said C & Co. to draw a draft on said Appellant for the said $2000 balance of said loan.

And the said draft was thereupon drawn, and the said C. & Co. thereupon took the same of the said Haas, and immediately passed the amount to Haas credit upon their books, and also entered the same as a deposit to his credit upon Haas' bank pass book, which said Haas kept in his own possession, as usual in such cases.

4th. The said draft was duly forwarded by said C. & Co. to their New York correspondents for collection in Boston, and was duly presented to Appellant for payment, and duly paid by him.

5th. The said Haas drew sundry checks upon the said C. & Co. against the said $2000, after the same was entered to his credit, and actually thus drew out of said bank over $800 of this money.

6th. On the 9th of August following the said C. & Co failed in business, and made an assignment for the benefit of their creditors, putting said Haas among their preferred creditors for the balance of his bank account, about $1175.

It is clear, from the facts of the case, that the Appellee, George Haas, when he drew or authorized to be drawn, the draft on Merriam for the $2000, transferred and intended to transfer his claim on said Merriam for the balance of said loan, to Messrs. Caldwell & Co., his bankers; and that by having said amount entered to his credit on their bank books, and also upon his own bank pass book, he accepted said credit as payment and satisfaction of his said claim on Merriam.

From the moment of this transaction Haas became th creditor of C. & Co., and they, his debtors for the $2000; while C. & Co. became the creditors of Merriam and he, their debtor for the amount.

All the parties at the time and subsequently acted upon the faith that such was the nature of this transaction;—Haas, by accepting the credit to his bank account, and drawing upon it from time to time; Caldwell & Co., by entering

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Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 190.

MERRIAM, *vs.* HAAS ET UX.

APPEAL FROM THE MINNESOTA DISTRICT.

BRIEF FOR THE APPELLEES.

Merriam filed his bill for the foreclosure of a mortgage executed by Haas and his wife; and these are the only parties.

The mortage was to secure a promissory note made by Haas in favor of Merriam for $6,000, payable in two years, with interest semi-annually at 15 per cent. The note and mortgage bear date the 24th May, 1859.

The defendants answered, admitting the execution of the note and mortgage, and that the sum of $4,000, and interest, (parcel of the amount so secured) was due and unpaid; and they submitted to a decree for that sum. But as to the residue ($2,000 and interest) they insisted that they never owed it, because, they alleged, they had only received from Merriam the sum of $4,000, and not the sum of $6,000 as was agreed, and on the faith of which agreement the note and mortgage had been executed and delivered.

This defence was in part evidenced by "Exhibit A," (Rec. p. 28–9,) afterwards regularly proven, which bears even date with the note and mortgage, is signed by Merriam, and sets forth that only $4,000 had been in fact advanced by Haas, and that the remaining $2,000 were to be paid when a certain building on the mortgaged premises should be completed, insured for $4,000, and the policy transferred to Merriam.

The transaction was negotiated through the house of Caldwell & Co., at St. Paul, Minnesota, through whom the sum of $4,000 was paid by Merriam to Haas, and who were authorized by Merriam (residing in Boston) to receive the policies of insurance when they should be effected, and to arrange for the further payment then to be made by Merriam.

The policies of insurance were delivered to Caldwell & Co., January 17, 1860, as appears by their receipt.

Rec., p. 29. 1859

On the 8th August, 1860, Caldwell & Co. having failed in their business, executed an assignment.

The "bank book" of Haas with Caldwell & Co., showed entries on the debit side for checks paid to August 7, 1859 ~~1860,~~ (the day before the assignment,) and on the credit side one entry on the 30th of that month, (twenty-two days after the assignment,) the same being "*by cash two thousand dollars,*" the sum in controversy.

Rec., pp. 30, 21.

I.

The question upon the merits was, whether the sum of $2,000 (of which Haas never got the benefit) should be lost by him or Merriam, upon the facts in evidence.

The testimony is brief, and will be referred to upon the oral argument. It fully sustains the decree below; or, if there should be a doubt as to this, it must be conceded that the question of fact will not be re-opened here upon the mere doubt, which the court below, acting as a jury with judicial intelligence and independence, could better resolve (the question of fact) than this Court. The presumptions in favor of the decree below ought to support it, especially where the doubt, if it be one, is as to the date when the $2,000 went to the credit of Haas: whether August 1, or August 30—the bank book of Haas showing the latter date—and the only testimony against it being that (in effect) at that date *such an entry could* *not properly be made* since the house had failed, and made an assignment twenty-two days before.

Nevertheless, the bank-book is returned to Haas with the *genuine entry*, (about which there is no dispute,) giving him the credit August 30, ~~1860~~ 1859, when the credit was only form, and had no substance.

II.

It seems plain that in every view of the merits, the decree must be ~~reversed and the cause remanded~~ affirmed.

At a former day of this term, a motion was made by the appellees to dismiss the appeal. This motion was founded upon the following facts apparent in the record.

Rec., pp. 9, 10, *et seq.—Decree of foreclosure and sale for the sum admitted by the answer, with interest and costs. This was in June,* 1861.

Rec., pp. 31–2.—*Appeal by complainant, April,* 1862.

Rec., pp. 37–8.—*Sale and report of master in execution of the decree. Sale made after appeal, to-wit: November* 15, 1862.

Rec., pp. 40–1.—*Payment into court by defendant of amount of decree, for redemption, and receipt for the same, eo nomine, by complainant.*

The motion to dismiss was founded on the idea that the decree being in favor of the appellant, his appeal necessarily suspended the execution of it; and the erroneous deduction (as it now appears) was that by *executing the decree the appeal was waived.*

This Court upon that motion determined otherwise; and held that the proceedings subsequent to the appeal did not waive it.

But in the Minnesota Railroad case (No. 132 of this term) upon the motion for *prohibition*, it was said by the Court (Mr. Justice Nelson delivering the opinion) that it would be against all reason and principle that a complainant having appealed from a decree in his favor because it did not give all he asked, should, pending his appeal, execute the decree which he alleged, by his appeal, to be erroneous.

The decision upon the motion in the case at bar therefore, evidently rests upon the only alternative which could have been in the mind of the Court upon the motion in the case cited, to-wit: that all the proceedings in execution of the decree after the appeal prayed and allowed, were erroneous, because after appeal taken by the complainant there could be no execution of the decree by him.

Of consequence the sale and all the proceedings subsequent to the decree of foreclosure were erroneous, and the cause must be remanded.

Some complication may possibly arise upon such a mandate.

But it is clear that either the appeal ought to have been dismissed, (which has been denied,) or that the proceedings subsequent to the appeal were erroneous, and must be so declared by this Court.

J. M. CARLISLE.
C. D. GILFILLAN,
For Appellees.